Office-Supreme Court, U.S.
FILED
SEP 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-270 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE L. GHIDONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

15pp

QUESTION PRESENTED

Whether, consistently with the Fifth Amendment privilege against compelled self-incrimination, a defendant in a criminal trial may be ordered to sign a form authorizing a bank at which he may have an account to produce subpoenaed bank records, where the records are located in an office of the bank in a country whose bank secrecy law prohibits disclosure of bank records without the consent of the bank's customer and the authorization form does not admit the existence of the records, the defendant's control over the records, or the authenticity of the records.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 ..... 7, 8

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 6

Fisher v. *United States*, 425 U.S. 391 ..... 4, 6, 7

Gilbert v. *California*, 388 U.S. 263 7

Grand Jury 81-2, In re, 550 F. Supp. 24 6

Grand Jury Proceedings (Bank of Nova Scotia), In re, 691 F.2d 1384, cert. denied, No. 82-1531 (June 13, 1983) 6

Grand Jury Proceedings (Field), In re, 532 F.2d 404, cert. denied, 429 U.S. 940 6

Holt v. *United States*, 218 U.S. 245 7

Mannington Mills, Inc. v. *Congoleum Corp.*, 595 F.2d 1287 6

Marc Rich & Co., A.G. v. *United States*, 707 F.2d 663, cert. denied, No. 82-2011 (June 27, 1983) 6

Page

Cases—Continued:

Marchetti v. *United States*, 390 U.S. 39 9

Schmerber v. *California*, 384 U.S. 757 7

SEC v. *Banca Della Svizzera Italiana*, 92 F.R.D. 111 6

United States v. *Doe*, No. 82-786 (Feb. 28, 1984) 5, 8

United States v. *Euge*, 444 U.S. 707 7

United States v. *Miller*, 425 U.S. 435 6

United States v. *Payner*, 447 U.S. 727 6

United States v. *Vetco, Inc.*, 644 F.2d 1324, cert. denied, 454 U.S. 1098 6

United States v. *Wade*, 388 U.S. 218 7

Constitution and statute:

U.S. Const. Amend. V 4, 6, 7, 8, 9

26 U.S.C. 7206(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-270

LAWRENCE L. GHIDONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 732 F.2d 814. The orders of the district court (Pet. App. A1-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1984. A petition for rehearing was denied on June 8, 1984 (Pet. App. B12-B13). The petition for a writ of certiorari was filed on August 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of the court of appeals' decision affirming an order of the United States District Court for the Northern District of Florida holding petitioner in civil contempt for failing to comply with a prior order of the

district court requiring petitioner to sign a form allowing the Bank of Nova Scotia to produce certain Cayman Islands bank records, production of which might otherwise violate the bank secrecy law of the Cayman Islands.

1. Petitioner was indicted on October 5, 1983, on four counts of willfully and knowingly making false income tax returns, in violation of 26 U.S.C. 7206(1) (C.A. App. 1).[1] During 1976 and 1977, petitioner was president of a Florida corporation that sold building materials to a Middle East trading group (Pet. 5). The government alleged in the district court that a large portion of the profits of the corporation during 1976 and 1977 was diverted to a bank account established and controlled by petitioner at the Bank of Nova Scotia, George Town, Cayman Islands (C.A. App. 3, at 2). The government also alleged that income diverted to the bank account in the Cayman Islands was not reported on the corporate tax returns of petitioner's corporation for 1976 and 1977 and that income distributed from the corporation to petitioner's personal control was not reported on his personal income tax returns for 1976 and 1977 (*ibid.*).

2. On November 9, 1983, a trial subpoena was served on the Miami, Florida, office of the Bank of Nova Scotia, commanding the bank to produce at trial the Cayman Islands bank records of "Bank of Nova Scotia Trust Co., Sub. Acct. 1359" for the years 1976 and 1977 and any other bank records (1976 and later) of "Lawrence L. Ghidoni (individually), Lawrence L. Ghidoni and/or Joycelyn B. Ghidoni (jointly), or Clarendon, Limited (a Cayman Island corporation)" (C.A. App. 4, App. A).

---

[1]The numbers following references to the joint appendix filed in the court of appeals indicate document numbers, because the joint appendix is not consecutively paginated.

In a letter dated November 21, 1983 (C.A. App. 4, App. B), counsel for the Bank of Nova Scotia indicated that the bank's compliance with the subpoena could violate the Confidential Relationships (Preservation) Law of the Cayman Islands (C.A. App. 4, App. B.1), which, he stated, prohibits the bank from disclosing bank customer information contrary to its provisions and prescribes criminal sanctions for violations. The bank's counsel further stated that the bank's license to conduct business in the Cayman Islands was conditioned upon the bank's continued compliance with that country's banking laws, including the bank secrecy law. The bank's counsel also stated that under the banking law, a customer may waive the protection of the law and consent to disclosure. Counsel went on to suggest that a waiver of the Cayman Islands' bank secrecy law ordered by the district court would be the best approach to follow to obtain the subpoenaed records. Counsel provided a form that the bank would honor if it were executed by petitioner (C.A. App. 4, App. C).

On December 30, 1983, the district court ordered petitioner to execute, within ten days, a "direction" form similar to the one proposed by the bank's counsel. The form provided as follows (Pet. App. A10):

> **DIRECTION**
>
> I, LAWRENCE L. GHIDONI, of the State of Florida in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice,

> and to give evidence relevant thereto, in the case of the *United States of America* v. *Lawrence L. Ghidoni,* Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

In its December 30, 1983, order compelling petitioner to execute the direction form, the district court rejected, inter alia, petitioner's contention that such an order would violate petitioner's Fifth Amendment privilege against self-incrimination. Relying on *Fisher* v. *United States,* 425 U.S. 391 (1976), the court concluded that petitioner was not being asked to make any testimonial communication. The court reasoned (Pet. App. A8):

> Production of the documents (if there are documents) would be by The Bank of Nova Scotia. There is nothing communicative about the execution of the "direction" form. The accused would neither admit existence of such documents nor control by himself over such documents. Defendant will not vouch for the accuracy of any documents that may be produced. The authentication of the documents would not be by the accused, but would have to be by some authorized representative of The Bank of Nova Scotia.

By letter dated January 10, 1984, petitioner, through his attorney, refused to execute the form (C.A. App. 8). Based on that refusal, the district court ordered petitioner to show

cause why he should not be held in contempt of court (C.A. App. 10). Following a show cause hearing, the district court issued an order holding petitioner in civil contempt and ordering him into confinement, the confinement to commence seven days after the date of the civil contempt order (Pet. App. A11). Petitioner was to remain in confinement until such time as he purged himself of the contempt (*ibid.*). The district court stayed the confinement order pending appeal, however, subject to petitioner's posting of a $50,000 appeal bond (*id.* at A12).[2]

3. The court of appeals affirmed the contempt order, one judge dissenting (Pet. App. B1-B11). The court agreed with the district court's determination that the direction form was devoid of any testimonial aspects, noting that nothing in the form acknowledges that any bank accounts exist, that petitioner exercises control over any accounts that may exist, or that petitioner is able to authenticate any records that might be produced by the bank (*id.* at B6-B7). These factors, the court concluded, distinguished this case from *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 7-8, in which the Court accepted the finding of the lower courts that requiring the sole proprietor of a business to produce certain records would compel the respondent in that case to admit that the records existed, that they were in his possession, and that they were authentic.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, petitioner concedes (Pet. 10) that this is a case of first impression in the courts of appeals. Accordingly, further review is not warranted.

1. As the courts below determined (Pet. App. A3, B4 n.5) and petitioner acknowledges (Pet. 10-11), the district court could have ordered the Bank of Nova Scotia to produce the

---

[2]The district court has extended the stay of its confinement order pending disposition of this petition (Pet. 6-7).

records subpoenaed by the government.[3] But the court recognized that such an order would have presented the bank with the dilemma of having to choose between possibly violating the bank secrecy law of the Cayman Islands and violating an order of a United States court (Pet. App. A3-A4). The order requiring petitioner to sign a direction form was an attempt by the court to reach a reasonable compromise that satisfied the government's need to obtain the records while adequately respecting petitioner's rights and protecting the Bank of Nova Scotia from potential liability in the Cayman Islands.

Contrary to petitioner's argument, the order does not offend the Fifth Amendment. The privilege against self-incrimination "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher* v. *United States,* 425 U.S. 391, 408 (1976)

---

[3]The district court noted several considerations that make it abundantly clear that the government is entitled to the subpoenaed bank records. First, bank records are not protected from disclosure by any constitutional privilege, because the records are (1) maintained by third parties, (2) not private; and (3) not testimonial in nature. See *United States* v. *Miller,* 425 U.S. 435 (1976); *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21 (1974). In addition, a district court has the power to order a bank that does business in the United States to turn over records held by a branch of the same bank in a foreign jurisdiction. See *Marc Rich & Co., A.G.* v. *United States,* 707 F.2d 663 (2d Cir. 1983), cert. denied, No. 82-2011 (June 27, 1983); *In re Grand Jury Proceedings (Bank of Nova Scotia),* 691 F.2d 1384 (11th Cir. 1982), cert. denied, No. 82-1531 (June 13, 1983); *United States* v. *Vetco, Inc.,* 644 F.2d 1324, 1330 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Mannington Mills, Inc.* v. *Congoleum Corp.,* 595 F.2d 1287, 1297 (3d Cir. 1979); *In re Grand Jury Proceedings (Field),* 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *In re Grand Jury 81-2,* 550 F. Supp. 24 (W.D. Mich. 1982); *SEC* v. *Banca Della Svizzera Italiana,* 92 F.R.D. 111, 116 (S.D.N.Y. 1981). Finally, as the district court noted, this Court has "unequivocally held that foreign bank secrecy laws provide *no privacy rights for United States* citizens that are not otherwise present under the Constitution and laws of the United States." Pet. App. A3 (citing *United States* v. *Payner,* 447 U.S. 727, 732 n.4 (1980)).

(emphasis in original). See also *Andresen* v. *Maryland*, 427 U.S. 463, 473-475 (1976); *Schmerber* v. *California*, 384 U.S. 757, 763-764 (1966). Accordingly, while "the [Fifth Amendment] privilege is a bar against compelling 'communications' or 'testimony,' * * * compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber*, 384 U.S. at 764. Thus, this Court has held that the protection of the Fifth Amendment does not extend to the giving of blood samples (*Schmerber*), the giving of handwriting exemplars (*Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); see also *United States* v. *Euge*, 444 U.S. 707 (1980)), the giving of voice exemplars (*United States* v. *Wade*, 388 U.S. 218, 222-223 (1967)), or the donning of clothing worn by the perpetrator of a crime (*Holt* v. *United States*, 218 U.S. 245 (1910)).

This Court's reasoning in *Fisher*, 425 U.S. at 409-414, compels the conclusion that the direction form petitioner was ordered to sign is neither testimonial nor incriminating in any sense required to implicate the Fifth Amendment. As the district court determined (Pet. App. A8), and the court of appeals agreed (Pet. App. B6-B8), production of any records would be by the bank, not petitioner, and execution of the direction form would not be communicative because petitioner, in signing the form, would not admit either the existence of the bank records sought or control over such documents and would not vouch for the accuracy of any documents that might be produced. Moreover, authentication of the subpoenaed documents would be by some authorized representative of the bank, not petitioner. As the court of appeals noted (*id.* at B6), even after executing the direction form, petitioner would remain free to contend that the records do not exist, that he does not control them,

and that they are not authentic.[4] The direction form does no more than require petitioner to remove an obstacle to the bank's production of records it might have — records which petitioner concedes (Pet. 10) he has no right to keep from the government. The order here is in fact little different from a command that a homeowner open his doors to officers armed with a search warrant, an action that does not implicate the Fifth Amendment privilege. Cf. *Andresen* v. *Maryland, supra.*

2. Assuming arguendo that execution of the direction form would be testimonial, petitioner's claim of privilege nevertheless fails because the "testimony" would not entail self-incrimination. The government seeks bank records in this case. Any implicit admission by petitioner that those records exist or that they are his would be entirely incidental to the incrimination, if any, that would flow from information the bank would provide. The government would never have occasion to use the act of signing the direction form or the content of the form as evidence against petitioner. Petitioner is not even competent to authenticate records that are not his. And while an argument might be made that the

---

[4]Petitioner erroneously asserts (Pet. 11-13) that the court of appeals "mistakenly focused upon the act of signing the form rather than on the form itself." It is abundantly clear from a reading of the court's opinion that the court carefully considered the content of the form, not merely the act of signing the form. For example, the court stated that "the directive contains no implicit testimony that the records do in fact exist" (Pet. App. B6), "the directive makes no explicit statement regarding Ghidoni's control of the accounts" (*ibid.*), and "the directive contains no implicit testimony with respect to control" (*id.* at B7).

To the extent that petitioner claims that something about the content of the direction form is in fact testimonial and incriminating, the issue is essentially fact-bound. See *United States* v. *Doe,* No. 82-786 (Feb. 28, 1984), slip op. 8. This Court has traditionally been "reluctant to disturb findings of fact in which two courts below have concurred" (*ibid.*). Accordingly, the findings of the courts below must be upheld unless they have no support in the record. *Ibid.*

bank's disclosure of records in response to petitioner's execution of a waiver of bank secrecy rights is probative of the fact that the records pertain to him, a finding in that regard would still depend entirely on the bank's credibility, since the bank would still be the entity stating the point. Moreover, evidence that petitioner had waived his rights under the bank secrecy law would add little, if anything, to the bank's statement. Thus, there is no realistic possibility here that petitioner would be incriminated by his act of authorizing the bank to disclose records, as distinct from the bank's act of disclosing pursuant to the subpoena that was issued to it. In the absence of a real and substantial threat of self-incrimination, petitioner cannot claim a Fifth Amendment privilege to refuse to execute the direction form. See *Marchetti* v. *United States,* 390 U.S. 39, 53 (1968).

In sum, the only possibility of incrimination arises from the records themselves and any other evidence provided by the bank, as to which there is no privilege, not from petitioner's execution of the direction form. Allowing petitioner to stand in the way of production by refusing to execute the form would permit him, in effect, to create for himself a Fifth Amendment privilege in bank records by banking in a foreign country with a bank secrecy law. Vindication of Fifth Amendment interests does not require that result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

SEPTEMBER 1984

DOJ-1984-09